George P. Bailey & Sons, Inc. and International Brotherhood of Electrical Workers, Local Union No. 269, AFL–CIO. Case 4–CA–31620

April 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On July 2, 2003, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, George P. Bailey & Sons, Inc., Bristol, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. April 30, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Peter C. Verrochi, Esq., for the General Counsel.

David J. Truelove, Esq., of Trenton, New Jersey, for the Respondent.

Richard T. Aicher, Jr., Assistant Business Manager/Organizer, of Trenton, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on March 6, 2003. The charge was filed by the International Brotherhood of Electrical Workers, Local Union No. 269, AFL–CIO (the Union) on September 27, 2002,[1] against George P. Bailey & Sons, Inc. (Respondent). Complaint issued on October 30, alleging Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee Thomas Ditmars on August 16.

On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, performs electrical services in the construction industry from its facility in Bristol, Pennsylvania, from where it annually performs services valued in excess of $50,000 outside the state of Pennsylvania. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent is a family owned corporation performing electrical construction and maintenance work. There are four owners of Respondent. They are: Larry Bailey (L. Bailey), the president; William Bailey (W. Bailey), the secretary; Jason Bailey (J. Bailey), the vice-president; and Dustin Bailey (D. Bailey), the treasurer. Patti Bailey (P. Bailey), W. Bailey's wife, works for Respondent as office manager.[4] During the time alleged discriminatee Thomas Ditmars worked for Respondent, there were three journeyman electricians and four apprentices employed there. The journeymen electricians were: Norris Mucklow, Steve Reed, and Chris Kasparaitis. Gary

[1] All dates are in 2002 unless otherwise indicated.

[2] The General Counsel's unopposed motion to correct the transcript, dated April 28, 2003, is granted and received in evidence as G.C. Exh. 16.

[3] In making the findings, I have considered the demeanor of all witnesses, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.*, 179 F. 2d 749, 754 (2d Cir.), reversed on other grounds 340 U.S. 474 (1951).

[4] L. Bailey and P. Bailey were the only individuals named Bailey to testify during this trial. It is alleged in the complaint and Respondent admits that L. Bailey, W. Bailey, and J. Bailey are Respondent's agents and supervisors within the meaning of Sec. 2(11) and (13) of the Act.

Wilcox, Aaron Karpa, Ed Kolenda, and Ditmars worked as apprentices. The four owners also performed electrical work.

A. Ditmars' employment history

Prior to working for Respondent, Ditmars worked for Laclede Steel Company as an electrical apprentice. He left there on September 14, 2001, because the plant closed. Ditmars met with Local 269 Organizer Stephen Aldrich before and shortly after he was laid off from Laclede Steel. Aldrich gave Ditmars a list of nonunion electrical contractors, including Respondent, as places to apply for work. Ditmars testified Aldrich did not tell Ditmars he wanted him to serve as a union organizer when he gave him the list of contractors. Rather, Aldrich told Ditmars he had to take a test, which was 3 to 4 months away, to join the Union as the reason Ditmars should apply for work at nonunion contractors.

Ditmars began working for Respondent on January 14, with a starting wage of $11 an hour, and his hours of work were 7 a.m. to 3:30 p.m. He reported to Master Electrician Kasparaitis and they usually worked as a two-person crew. Ditmars credited and uncontradicted testimony reveals the following: In January, a union hand billed at the jobsite where Ditmars was working for Respondent. There was a discussion about the hand billing when Ditmars returned to the shop that afternoon. During the conversation, W. Bailey said in reference to the union hand billers, let the idiots stand out and freeze, we are making money.

Ditmars received an oral performance evaluation on April 15.[5] At that time, he met with L. Bailey, W. Bailey, J. Bailey, and P. Bailey. During the meeting, L. Bailey said they were satisfied with Ditmars' work, and he was following directions well. Ditmars received a $2 pay increase to $13 an hour.[6]

Respondent provided Ditmars with a Nextel cell phone and radio combination shortly after the April 15 evaluation meeting. P. Bailey gave Ditmars the phone, but gave him no instructions as to its usage. Ditmars testified 95 percent of the calls he made with the phone were personal calls. He testified he assumed he could use it to make personal calls as a perk of the job as he saw Kasparaitis use his company phone to talk to his wife numerous times. Ditmars also saw Kolenda, on one occasion, use his cell phone to speak to his friend.

Ditmars was involved in an accident while driving a bucket truck owned by Respondent on July 9. Ditmars was getting ready to park the bucket truck and he clipped the right rear bumper of Kasparaitis' company van. One of the side compartment tool doors fell off the bucket truck, and one was dented. There was also some damage on the right rear bumper on the van and a dent on the right side of the van. Ditmars reported the accident to L. Bailey, who said he appreciated Ditmars not trying to hide it. Respondent repaired both vehicles in house, and the repairs took several days.

Ditmars second oral evaluation meeting occurred on July 17. Present were L. Bailey, W. Bailey, J. Bailey, P. Bailey, and Ditmars. Ditmars' credited testimony reveals L. Bailey spoke at the meeting and told Ditmars they liked his work and he was receiving a $.50 an hour raise.[7] However, L. Bailey told Ditmars to be more careful with the company vehicles in view of Ditmars' recent accident. L. Bailey's credited testimony reveals that, during the meeting, he also told Ditmars that Ditmars had a lot of phone calls on his company cell phone and that the phone was basically to be used for company use, although he could use the phone if he had to call someone.[8]

Ditmars credited testimony reveals the following: Ditmars signed a union authorization card on June 14. Ditmars met with Aldrich at the union hall on Monday, August 12, at which time Aldrich asked him to be a volunteer organizer at Respondent. Ditmars agreed and Aldrich gave him some pamphlets and two t-shirts with union logos. Ditmars testified that Aldrich told him, "if anything happens to me, they have my, they're on my side." Aldrich told Ditmars to pass out the pamphlets and try and get a feeling for the Union with the rest of the company. The parties stipulated that on Tuesday morning August 13, Aldrich faxed a letter to J. Bailey, on the Union's letterhead, identifying Ditmars as a volunteer union organizer. L. Bailey acknowledged that he saw Aldrich's letter the day it was faxed to Respondent. On August 13, Ditmars wore a union t-shirt to work and he continued to wear one for the rest of the week. L. Bailey admitted seeing Ditmars wearing the union t-shirt on one or two occasions.[9]

[5] The evaluation date is set forth in the attendance calendar Respondent maintained for Ditmars. Respondent maintained these calendars for all of its employees who performed electrical work.

[6] I have credited Ditmars' testimony that L. Bailey's attended the April 15 evaluation session, although L. Bailey testified he was not there, since it is likely that Ditmars would have a better recollection of his initial appraisal conference than L. Bailey who engages in similar conferences for other employees. There is also no contention by Respondent that Ditmars did not receive a positive review at this time.

[7] Ditmars testified he had been told he would be evaluated every six months as an apprentice, and that he would receive a $.50 raise at each evaluation.

[8] Ditmars admitted L. Bailey said Ditmars was using the company cell phone too much, and that L. Bailey told him that he should try and cut back.

[9] Ditmars testified that, after work on August 13, he gave union pamphlets to Kolenda and Karpa. However, General Counsel witnesses Kolenda and Karpa testified Ditmars gave them the pamphlets in the morning before the start of work. Karpa testified Ditmars gave them the union literature the week of Ditmars' discharge. While, Kolenda estimated Ditmars gave them the literature a couple of weeks before Ditmars was discharged. Ditmars also testified he spoke to Kasparaitis about the Union during their lunch break on August 13 and he left about five copies of the Union's pamphlet with Aldrich's business cards and union authorization cards in the shop at around 3:30 p.m. Respondent's office and its shop are housed in separate buildings. Ditmars testified that after work on August 13, Ditmars walked into L. Bailey's office and told L. Bailey that Ditmars could not answer any of L. Bailey's questions. Ditmars said if L. Bailey had any questions to call Aldrich and he placed a copy of Aldrich's business card on L. Bailey's desk. L. Bailey denied this aspect of Ditmars' testimony. Taking into consideration the contradictory testimony of the General Counsel's witnesses as to Ditmars' union activity on August 13, I do not credit Ditmars' claims that he attempted to present L. Bailey with union materials on August 13, in the face of L. Bailey's denial. Nor do I find the General Counsel established that Ditmars distributed union literature to his co-workers on August 13. I do find, as set forth above, L. Bailey saw the Union's fax labeling Ditmars as a voluntary organizer on August 13, and L. Bailey saw Ditmars wearing a union t-shirt to

P. Bailey's credited testimony reveals, on the evening of August 14, at L. Bailey's instruction, she typed on a her computer a memo, dated August 14, to Ditmars which was then signed by L. Bailey.[10] The memo cites Ditmars' July 9, accident with Respondent's bucket truck and describes the repairs needed on Respondent's two vehicles as a result of the accident. The memo also cites the July 17, apprentice meeting where L. Bailey discussed with Ditmars the issue of careful driving and Ditmars' misuse of the company issued cell phone. The memo ends with the following, "As a warning, continued incidents with the company vehicles, damage to company property or misuse of company issued equipment could result in disciplinary action or termination."

Ditmars was summoned to a meeting with L. and P. Bailey on Thursday, August 15, after work at around 3:30 p.m. in one of Respondent's offices. Ditmars credibly testified that L. Bailey said, due to recent events such as the accident Ditmars was involved in with Kasparaitis' vehicle, they were going to start documenting that people have to be careful with company vehicles. L. Bailey handed Ditmars the August 14, written warning and said this was just for Ditmars to acknowledge he knew to be more careful and he needed to try and keep his cell phone use down. Ditmars testified L. Bailey basically read off the August 14 memo addressed to Ditmars, which Ditmars initialed during the meeting. Ditmars credibly testified he did not report to work late on August 15, and that there was no discussion of the time he arrived for work during this meeting. Ditmars credibly denied that L. Bailey said anything to Ditmars about anyone at Respondent damaging or misusing company tools or that L. Bailey mentioned an upcoming safety meeting.

L. Bailey and P. Bailey gave different accounts of the August 15 meeting than that provided by Ditmars. I found their testimony relating to the meeting to be contradictory, implausible, and not worthy of belief. They both testified that the reason for the meeting was that Ditmars arrived for work late on August 15. This in itself is highly suspect since P. Bailey's testimony reveals that, at L. Bailey's direction, she had typed a written warning to Ditmars on the evening of August 14, the content of which had nothing to do with Ditmars' attendance. Nevertheless, L. Bailey testified, that on the morning of August 15, he saw Ditmars park his car and walk into the shop at about 7:10 to 7:15 a.m. L. Bailey testified Ditmars was supposed to report at 7 a.m. L. Bailey testified that, at the August 15, meeting, "I explained to him that I called him into the meeting because he had been late. And I asked him why he was late. He said he had no reason." L. Bailey testified he told Ditmars to call if he was going to be late, to let Respondent know if and when he was coming so they could plan the work. Contrary to L. Bailey, P. Bailey testified that L. Bailey did not see Ditmars arrive at work on August 15, because L. Bailey was out at a jobsite when Ditmars reported to work. Rather, P. Bailey testified she was in the office when, later that morning, J. Bailey told L. Bailey that Ditmars was late when L. Bailey returned from the jobsite. Aside from the obvious inconsistencies in the testimony of Respondent's witnesses, L. Bailey's failure to confront Ditmars at 7:15 a.m. on the morning of August 15, about his alleged tardy arrival further undercuts his claim that he saw Ditmars report late on August 15. I therefore, considering the witnesses' demeanor, have concluded that Ditmars reported to work on time on August 15, and have credited his testimony concerning the August 15 meeting over that of L. Bailey and P. Bailey.[11]

P. Bailey testified that following the August 15 meeting she typed a file memo dated August 15, which reads as follows:

> A meeting was held on Thursday, August 15, 2002 at 4:20 p.m. Attending the meeting were Larry G. Bailey, Patti Jo. Bailey and Thomas J. Ditmars. Larry asked Tom to read over the warning sheet. Tom did so. Larry explained to Tom why George P. Bailey & Sons, Inc. wrote the warning paper. Tom was asked that if he agreed with the warning paper to sign the paper and he did so. Larry went over the damaging of company tools, misuse of tools, damaging of company vehicles and safety issues. Tom was made aware of that any employee who damages or misuse of tools will also be given a warning paper. Tom was told that in the last 6 months there has been a lot of damage to company tools and vehicles and that whoever damages the company property will be held responsible. Tom was made aware that we were not singling him out but that there were going to be other write ups with more recent damage that was done to company equipment. Tom was also asked why he was late this a.m. and Tom stated, "no reason". Larry told Tom that if you are ever going to be late just give a phone call, Tom agreed. Tom was made aware that George P. Bailey & Sons, Inc. was going to have a safety meeting with all employees. Tom was given a warning paper.[12]

L. Bailey testified that, during his August 15 meeting with Ditmars, he did not accuse Ditmars of damaging or misusing company tools. Rather, L. Bailey testified Respondent was experiencing a problem with a lot of tools being lost or damaged, and during the meeting, he tried to alert Ditmars that there was problem at the company. However, L. Bailey testified he did not put anything in writing in other employees' files about damaging or misuse of company tools.

On Friday, August 16, Ditmars was scheduled to work at a jobsite in Monmouth County, New Jersey, which was about an hour drive from Respondent's shop. At the time, Ditmars lived

work during the week of August 13, before he discharged Ditmars on August 16.

[10] L. Bailey testified he handwrote the memo and P. Bailey typed it.

[11] The August 14 warning to Ditmars was typed on a computer, and could have easily been amended to include Ditmars' alleged late arrival on August 15, when he was presented with the warning that afternoon, had he in fact reported late the morning of August 15. Yet, there was no reference to Ditmars' alleged late arrival in the written warning. Respondent argues in its brief that an adverse inference should be drawn by General Counsel's witnesses Karpa and Kolenda's failure to testify that Ditmars reported on time on August 15. I reject this contention. Ditmars' credited testimony reveals he was never accused of reporting late on August 15, prior to his discharge. Noting that the evidence shows reporting late was not an infrequent occurrence at Respondent, it would be highly unlikely that an employee, who testified on March 6, 2003, would be able to remember whether another employee was 10 minutes late or on time on August 15, 2002.

[12] There is no contention Ditmars was ever presented a copy of the August 15 file memo.

less than a 5 minute drive from Respondent's shop. Ditmars testified that a power failure caused his alarm not to go off on August 16, and he did not wake up until 9 a.m. He testified he tried to use his company phone and radio to call in that he was late, but they would not work. Ditmars home phone was shut off at the time. Rather, than reporting to Respondent's shop, Ditmars went directly to the Monmouth County jobsite and he arrived there around 10:30 a.m. When Ditmars got to the job, he told Kasparaitis what happened, and Kasparaitis gave Ditmars an assignment, which involved his returning to the shop. Ditmars arrived at the shop around 11:30 a.m., which was close to the lunch break. At that time, Ditmars met with L. and D. Bailey in the main office. Ditmars testified L. Bailey said you were late this morning and you did not call. Ditmars said he tried calling but the phone would not work. L. Bailey said we cannot have this and Ditmars was fired. Ditmars testified he told L. Bailey why he was late, although L. Bailey did not ask for the reason. L. Bailey followed Ditmars to his car to retrieve Respondent's cell phone. Ditmars testified he dialed a number and demonstrated to L. Bailey the phone did not work. However, L. Bailey just took the phone and Ditmars went home. Ditmars testified that L. Bailey did not say anything about the time he arrived for work on Thursday, August 15, or about his cell phone use during this meeting. Ditmars admitting telling L. Bailey that Ditmars messed up by not calling in or notifying the company. Ditmars denied telling L. Bailey that he did not blame him for firing him.

L. Bailey testified he learned Ditmars was late around 7:30 a.m. on August 16, when he failed to report to the shop. As a result, L. Bailey sent Mucklow out with Kasparaitis to the Monmouth jobsite in place of Ditmars. Mucklow was supposed to go out with L. Bailey, who worked alone instead. L. Bailey was able to complete the work he had to do that day without assistance. L. Bailey testified Ditmars reported directly to the Monmouth County jobsite later that day and Kasparaitis sent Ditmars back to the shop with an assignment there. L. Bailey returned to the office right before the noon lunchbreak. L. Bailey testified he had separate conversations with the other three owners. He testified they knew he had a meeting with Ditmars the day before, and "we all decided to terminate him."

L. Bailey testified Ditmars arrived at the shop around 1 or 1:30 p.m. on August 16, and L. Bailey told him to come into the office and asked him what happened. L. Bailey testified Ditmars said he woke up and his phone was blinking. L. Bailey asked why he did not call and Ditmars said the phone did not work. L. Bailey asked why Ditmars did not use a pay phone or his own phone. Ditmars said he did not have a phone. L. Bailey asked why Ditmars did not drive to the shop. Ditmars said he panicked and drove to the jobsite. L. Bailey said he could not understand why Ditmars did not try to make a phone call or come to the shop. L. Bailey said he had to take the man that was supposed work with L. Bailey and send him on Ditmars' job. L. Bailey said it was unacceptable for Ditmars not to call and let them know when or if he was coming in. L. Bailey said we are going to have to terminate you. L Bailey testified Ditmars said, "I made a mistake, I don't blame you for firing me." L. Bailey testified he walked Ditmars out to his car, and Ditmars handed him Respondent's cell phone and then left. He testified Ditmars did not do anything with the phone. L. Bailey went inside the office and handed the phone to P. Bailey and he asked her to key up the phone's radio and it worked. He testified that, to his understanding, if the radio was working then phone was working. L. Bailey testified he had made a decision to discharge Ditmars even before he talked to him, and that no matter what Ditmars said it would not have impacted on that decision.

L. Bailey's account of the August 16, termination meeting was in many respects similar to that of Ditmars. Neither testified that L. Bailey told Ditmars that he was being fired, at least in part, for excessive cell phone usage. Moreover, neither testified that L. Bailey referenced Ditmars' alleged late arrival on August 15, during their August 16 meeting. Since I have concluded, for reasons set forth below, that Respondent's officials were not above providing false reasons for discharging Ditmars, I have credited Ditmars' over L. Bailey and have concluded that Ditmars did not tell L. Bailey that he did not blame L. Bailey for firing him.

While I have in large part credited Ditmars' account of the August 16, meeting, I do not credit his claim that his cell phone was not working on that date. First, I find it highly improbable that Ditmars' cell phone did not function on the same day he testified a power outage caused his alarm not to go off. Ditmars testified he did not wake up until 9 a.m. on August 16. While he knew he was supposed to report to the shop, which was only 5 minutes from his home to receive his assignment, he went directly to the jobsite, which was an hour drive. Regardless of whether his cell phone worked, it would have been an easy drive to report to the shop, explain why he was late, and see if his assignment had changed due to his late arrival. I therefore do not credit his testimony that his cell phone did not work, and I also find it irrelevant, because regardless of whether his cell phone worked, Ditmars knew he was supposed to contact the shop when he was going to be late or miss work, as he had done in the past, and he failed to do so. I find the written warning and disciplinary interview Ditmars received on the evening of August 15, contributed to Ditmars' failure to contact Respondent's officials on August 16, when he overslept. In this regard, L. Bailey testified Ditmars told L. Bailey, during Ditmars' August 16 termination meeting, that Ditmars panicked as the reason for his driving directly to the jobsite without first contacting Respondent.

Ditmars was discharged on Friday, August 16, and he began working for a union contractor on Monday, August 19, although he had not taken the Union's exam, which he testified was a prerequisite for union related employment. Ditmars explained he was able to get a job with a union contractor without the exam because he had been discharged after he became a union organizer. General Counsel witnesses Karpa and Kolenda worked for Respondent until they went on strike on September 26. Karpa and Kolenda testified that they went on strike over Ditmars' discharge in that they felt he was unlawfully terminated. Karpa, Kolenda, and L. Bailey testified that they notified L. Bailey they were going out on strike on September 26. Karpa testified that, after Ditmars was discharged, in late August, the Union faxed information about Karpa and Kolenda's pro-union status to Respondent. Karpa testified

from that point until he went on strike, his job assignments remained the same, he received no write-ups, and no one from management approached him about the Union. Kolenda testified that, on December 13, 2001, P. Bailey had a discussion with him about excessive cell phone use and that in September 2002, L. Bailey had a discussion with him about excessive cell phone use for which Kolenda was given a written warning dated September 9, 2002.

B. Analysis

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding cases turning on employer motivation. To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The elements commonly required to support a finding of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993). In *Washington Nursing Home*, 321 NLRB 366, 375 (1996), it was held that:

> Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1990), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Associacion Hospital del Maestro*, 291 NLRB 198, 204 (1988); and *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

Similarly, in *La Gloria Oil and Gas Co.*, 337 NLRB No. 177, slip op. at 5 (2002), the timing of discharges on the heels of union activity and evidence of disparate treatment resulted in a finding that the reasons advanced for the termination of employees Saylor and Lamp were pretextual and that they were terminated for their union activity. Thus, the Board has held that when the stated reasons for a disciplinary action are found to be false, "the Board may infer that there is another reason--an unlawful one which the employer seeks to conceal-…." *Amber Foods, Inc.*, 338 NLRB No. 84, slip op. at 4 (2002).

In the instant case, on August 13, the Union notified Respondent's officials by fax that Ditmars was a voluntary union organizer, and Ditmars began to wear a union t-shirt to work. I find that L. Bailey reacted to this news by having P. Bailey type a warning letter to Ditmars on the evening of August 14, which was presented to Ditmars after work on August 15. The warning cites two indiscretions that had previously been discussed with Ditmars during his July 17 evaluation meeting, a driving accident with Respondent's vehicles that took place on July 9, and Ditmars excessive use of Respondent's cell phone. L. Bailey testified that he had not reviewed any other of Ditmars cell phone records between the time of the July 17, evaluation meeting and the time he directed P. Bailey to type the August 14 warning letter, almost a month later.[13] Thus, Respondent provided no explanation for the timing of the August 14 warning letter, and I can only attribute it to Ditmars' union activity, disclosed to Respondent on August 13. Further, as set forth above, I have discredited the testimony of L. and P. Bailey that Ditmars showed up 10 minutes late for work on August 15. I have therefore concluded that Ditmars' August 14, written warning tendered to him on August 15, and the August 15, memo to his file were issued for pretextual reasons.[14] While the August 14 warning and the August 15 file memo are not specifically alleged in the complaint, the circumstances relating to the issuance of these documents were fully litigated and the documents are closely related to the events leading to Ditmars' August 16, discharge. Respondent's witnesses testified about these documents and in fact, the August 15, file memo was introduced as Respondent's exhibit and had not been shown to Ditmars prior to his discharge. Accordingly, I find that Respondent's issuance of the August 14, written warning to Ditmars and the August 15, file memo to be violative of Section 8(a)(1) and (3) of the Act. See *Marshall Durban Poultry Co.*, 310 NLRB 68 fn. 1, enfd. in relevant part 39 F. 3d 1312 (5th Cir 1994) where a series of fully litigated warnings closely related to complaint allegations where found violative of the Act; and *Monroe Auto Equipment Co.*, 230 NLRB 742, 751 (1977).

Thus, within 3 days of being notified Ditmars was a voluntary organizer, Respondent had papered his file with an unlawful warning letter and file memo, held a disciplinary meeting for conduct that occurred a month earlier and then discharged him. I have concluded that the General Counsel has established a prima facie case that the discharge was unlawfully motivated, and for the reasons set forth below I find the justifications advanced for Ditmars' termination are based on disparate treatment and pretextual.

The evidence is not in conflict that Ditmars did not report on time on August 16, that he failed to call in, and that he compounded this transgression by reporting directly to Respondent's jobsite, rather than reporting to Respondent's facility as Respondent required him to do. However, L. Bailey's testimony was somewhat inconsistent at to the reasons he discharged Ditmars. L. Bailey initially testified he decided to discharge Ditmars when he heard at 11 a.m. on August 16, that Ditmars had traveled to the Monmouth jobsite without calling

[13] L. Bailey claimed he did not review Ditmars' cell phone records until August 16, shortly before he discharged Ditmars.

[14] The August 15 memo in fact makes what I have concluded to be a veiled reference to Ditmars' union activity by stating Respondent was not "singling out" Ditmars concerning a recent spate of alleged damage to company tools and vehicles. Yet, L. Bailey testified that Ditmars was the only employee for whom there was a private discussion where damage to company equipment was raised, and there was no documentation about it for any other employee's file. Moreover, despite the documentation to his file on this topic, L. Bailey admitted Ditmars was not being accused of damaging Respondent's tools.

in or reporting to the office, which was only 3 miles from Ditmars' home. L. Bailey then testified he did not know exactly when he decided to discharge Ditmars, but it was "sometime in that period where he didn't show up for work. I didn't know that he showed up on the job till after that, so I don't really know exactly when it happened." While L. Bailey initially testified he decided to discharge Ditmars at 11 a.m., or earlier when he found out Ditmars did not show up for work, he later testified Respondent first received Nextel's phone bill for the usage period of June 18 to July 17, after lunch on August 16, although the "statement date" on the bill is July 21, 2002.

L. Bailey then testified, "when I took a look at these phone records, I would say that was pretty much the end of it." L. Bailey testified the Nextel bill showed Ditmars made 221 phone calls during the billing period and that he had not discharged Ditmars until after he reviewed the phone records that afternoon. He now claimed it was the phone records in combination with Ditmars showing up late for work that caused L. Bailey to fire him, although he maintained the main reason was Ditmars' failure to show up for work.

In addition to the continuous shifts in his testimony, L. Bailey could not adequately explain why it took Respondent almost a month to received the Nextel bill, from the bill's statement date. He testified P. Bailey could better explain the large gap in the statement date from the time of receipt of the bill. However, P. Bailey was never questioned about the timing of the receipt. I do not credit L. Bailey's self-serving declaration that Respondent first received the July 21 bill on August 16, or that he first reviewed the bill shortly before he discharged Ditmars. In this regard, the testimony of Ditmars and L. Bailey reveals that L. Bailey did not cite Ditmars phone calls during the August 16 discharge meeting. I find that, had L. Bailey reviewed the cell phone bill shortly before the discharge meeting as he contended, he would have raised the matter at the meeting.[15] I view the shifting and implausible content of L. Bailey's testimony to underscore the pretextual nature of Ditmars' termination.

Concerning, Respondent's attendance policy, L. Bailey testified Respondent has no time clock or sign in sheets. L. Bailey testified employees are supposed to report at 7 a.m., but he initially testified employees would have a 5 to 10 minute grace period after 7 a.m. before they are marked late.[16] He then testified, "I would guess five minutes." L. Bailey testified Respondent's procedure is that if an employee is going to be late they should call in. He then testified if an employee is going to be 5 minutes late, they will get a lateness marked on Respondent's attendance calendar, "but I think normally Patti removed it if they called." L. Bailey then testified that even if they do call, it would still be marked on the calendar with a note they called. L. Bailey also testified, that "I would expect that if a person came in late, that they could at least come in and say I'm late because of something happened, and there wouldn't be a problem if they had an excuse. There was an accident, it wouldn't be a problem." Thus, Respondent's attendance policy is imprecise at best.[17]

Moreover, a review of Respondent's attendance calendars reveals that Respondent tolerated much worse attendance from other employees than the conduct, which resulted in Ditmars' discharge. Ditmars was hired on January 14. He attended a funeral on May 16, which P. Bailey testified was an excused day off. Ditmars was absent on July 12, for which P. Bailey testified he placed a timely call to let Respondent know he was going to be out. Ditmars did not work on July 29, because his son was hospitalized. Ditmars showed up at Respondent's facility before the start of the workday to let them know he would not be available. L. Bailey testified Ditmars absence on July 29, was not held against him. Ditmars reported late on August 16, and was summarily discharged.

Respondent's records for apprentice Michael Bradley show he was hired on April 3, 2000. P. Bailey's testimony, on review of Bradley's 2000 attendance calendar shows: Bradley was absent on April 13 and 15, May 2, 3, and 18, June 13 and 14, July 17, August 14, September 22, and November 6, 2000. Bradley only worked partial days on April 28, May 10 and 13, June 6, July 5, 7, and 15, August 11 and 18, and on September 27, 2000. Bradley was late for work on May 16, June 17, July 21, September 6, October 2, 6, and 25, and on November 13 and 14, 2000. On July 25 and 26, Bradley took vacation with no pay. On October 15, Bradley walked of the job. Bradley did not receive his first oral warning for attendance until October 3, and on October 9, Bradley received a second oral warning. Bradley was discharged on November 15, 2000, due to absenteeism and tardiness.

Respondent's records show apprentice Gerald Capie was hired on February 12, 2001. P. Bailey's testimony, on review of Capie's 2001 attendance calendar shows that: Capie was late for work on February 13, showing up at 10:30 a.m. On February 17, he did not call or show up for work. He was late on February 17, showing up at 7:15 a.m. He was late on March 1 and was given a verbal warning on that date. Capie was late on March 12, arriving at 7:15 a.m. Capie was absent from work on April 5, but did not call in until 7:15 a.m. Capie was late on April 18 and 19, arriving at 7:10 a.m. on each day. He was late on April 21, arriving at 7:30 a.m. and he was sent home. On May 21, Capie did not call or show up for work. J. Bailey called and left a message for Capie to call Respondent. The calendar reflects that Capie called at 2:30 p.m. on May 22, 2001, and quit. L. Bailey testified Capie called and asked if he could quit after not showing up for 2 days.

Karpa was hired on May 22, 2000. Karpa's credited testimony reveals that, not long after he started work in 2000, he missed a day of work without calling in. L. Bailey told Karpa not to let it happen again. P. Bailey, on review of Karpa's 2001 attendance calendar, testified that: On March 24, Karpa was 30 minutes late, and on March 26, he was 10 minutes late. Karpa

[15] I also note that the July 21, Nextel bill is clear on its face that the vast majority of the calls on the bill had been made by July 17, which was on or before L. Bailey's July 17 counseling to Ditmars that he needed to cut back on his cell phone usage.

[16] Respondent's attendance calendar for Ditmars shows an entry for August 15, of no call arrived 7:10 a.m.

[17] L. Bailey testified Respondent's record keeping improved when P. Bailey took over. However, P. Bailey testified before she converted from part time to full time in June 2001, the other secretary kept the attendance records, and she kept pretty good records.

was 10 minutes late on April 16, and 90 minutes late on April 17. On April 18, Karpa was issued a verbal warning for coming in late. Karpa worked part of the day on July 13, and he called in sick on August 19 and 20. Karpa took off on August 23 and 24, due to a death in the family, and W. Bailey counseled him for being late on August 25.[18] On November 4, Karpa did not call or show up for work. On November 8, Karpa was 90 minutes late. On December 26, Karpa called at 6:30 a.m. and let Respondent know he did not have a ride to work. On December 27, L. Bailey and W. Bailey counseled Karpa. P. Bailey's testimony, on review of Karpa's 2002 attendance calendar, reveals that: Karpa was late on February 16, reporting at 7:30 a.m., and late on February 19, reporting at 7:25 a.m.[19] On August 26, Karpa called in sick, and on August 30, Karpa left at noon.

Kolenda was hired on September 10, 2001. P. Bailey, on review of Kolenda's 2001 absentee calendar, testified that: Kolenda left early on October 9 and on October 11, at 1 p.m. and 3 p.m., respectively. Kolenda was scheduled to work on Saturday, November 10, but he did not show and failed to call until 11:30 a.m., and L. Bailey told him not to come in.[20] P. Bailey, on review of Kolenda's 2002 calendar, testified that on January 12, he was supposed to report at 7 a.m., but did not call in until 8 a.m. On February 9, Kolenda did not show or call in. Rather, someone from the company called him and he arrived at work at 7:30 a.m. On August 11, Kolenda left an hour early.

Thus, Respondent's attendance records show that it tolerated multiple attendance infractions from its employees, until it was notified that Ditmars was a voluntary organizer. At which point, it discharged Ditmars for being late on one occasion. Respondent contends at page 3 of its post-hearing brief that, "In the past year or two, the employees were provided Nextel telephones and radios for the purpose of calling in, as well as communicating with other employees." Respondent argues at the same page of its brief that its attendance policy "became more stringent once the employees were given the Nextel cell phones/radios." I do not find these arguments to be very convincing. First, Respondent never established when it started using the cell phones. P. Bailey could only testify that she did not believe Capie, who worked for Respondent in 2001 was given a Nextel phone, and that she did not believe but was not sure whether Bradley, who worked for Respondent in 2000 had one. Moreover, L. Bailey never testified Respondent's attendance policy changed when employees received cell phones. In fact, he testified, despite his employees having cell phones that "I would expect that if a person came in late, that they could at least come in and say I'm late because of something happened, and there wouldn't be a problem if they had an excuse." "But if somebody shows up late and doesn't say anything to you or doesn't call, to me they're trying to come in late without letting me know they're late, and I got a problem with somebody doing that." Thus, I reject the argument that the attendance policy changed when employees were given cell phones.[21]

In sum, Respondent was notified Ditmars was a union organizer on August 13. On August 15, he was given a written warning dated August 14, for conduct occurring a month earlier for which Respondent at the time concluded only required a verbal counseling. I have determined that Respondent has, after the fact, falsely accused him or reporting 10 minutes late on August 15, and has discharged him for reporting late on August 16, although theretofore Ditmars had maintained a good attendance at Respondent. Respondent's records and the credited testimony shows that Respondent had tolerated much worse attendance from other employees, without even disciplining them, than the conduct for which it discharged Ditmars. Accordingly, I find the reasons advanced for Ditmars' termination were pretextual and Respondent discharged Ditmars on August 16, in violation of Section 8(a)(1) and (3) of the Act.[22]

Respondent argues in its brief that in July 2002, Ditmars was warned about excessive phone use, and that Ditmars, at that time, assured L. Bailey he would cut back. It is argued that after Ditmars was discharged, a review of the prior month's phone bill, again reflected a large disparity of the personal calls made by Ditmars when compared to the calls of other apprentices. Respondent contends at page 13 of its brief, that once Ditmars' continued excessive phone use was discovered after his discharge, it is clear that Ditmars would have been discharged at that time. In this regard, L. Bailey testified he had never had an employee use his cell phone to the extent Ditmars was using it. L. Bailey testified, that after Ditmars was discharged, he reviewed the phone bills for the last month Ditmars had worked there and that Ditmars' phone usage was excessive for 4 months in a row.

In *Tel Data Corp.*, 315 NLRB 364, 366 (1994), affd. in relevant part, 90 F. 3d 1195 (6th Cir. 1996), the Board set for the

[18] Karpa credibly testified around the end of the summer 2001, Karpa was an hour and one half to 2 hours late for work. P. Bailey called him at his home around 8:30 a.m. and woke him up. When Karpa arrived at his jobsite, J. Bailey asked Karpa if they were going to have to call him every day to make sure he came to work, and Karpa said no.

[19] L. Bailey testified that he made the lateness notations on Karpas' attendance calendar for February 16 and 19. L. Bailey testified he did not have an independent recollection of those dates, but based on his review of the calendar he testified Karpa called in on time and stated he would be late on those two dates. I do not credit L. Bailey's testimony that Karpa called in a timely fashion. Respondent's calendars show multiple late arrivals for several employees, some coming in as little as 10 minutes late. Yet, the calendars in most instances do not show whether the employee called in and notified Respondent he was going to be late. Considering his demeanor, I do not find Respondent's attendance calendars as precise as L. Bailey attempted to portray them concerning whether someone called in to report they were going to be late.

[20] Kolenda testified he overslept.

[21] I also reject Respondent's contention that Ditmars intentionally engaged in conduct that would result in his discharge so he could obtain higher union wages by working elsewhere. Ditmars overslept on August 16, but he thereafter drove an hour directly to the Monmouth jobsite in an effort to rectify his mistake. While admittedly he should have called Respondent or reported to the shop before going to the jobsite, his driving an hour in an effort to begin work does not suggest that Ditmars was an individual who was intent on forfeiting his job.

[22] I find cases such as *Maple Grove Healthcare Center*, 330 NLRB 775, 777 (2000), relied on by Respondent to be distinguishable from the facts herein. In *Maple Grove*, the alleged discriminatee had a series of prior disciplines, and the respondent maintained a uniform policy of policy of progressive discipline resulting in the employee's discharge.

following standard for consideration of knowledge of misconduct obtained by a respondent after if had unlawfully discharged an employee. It was held in that case that:

> Under Board precedent, 'if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct.' *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993), citing *John Cuneo, Inc.*, 298 NLRB 856, 856-857 (1990), and *Axelson, Inc.*, 285 NLRB 862, 866 (1977).

The Board concluded in *Tel Data Corp.*, supra at 367, where it was discovered that the discriminatee over reported hours on his time card, that the respondent "did not satisfy its burden of establishing that it would have discharged any other employee for the same conduct. Accordingly, Frederick is entitled to reinstatement and full backpay." In *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993), affd. in relevant part 39 F.3d 1312 (5th Cir. 1994), the Board refused to order reinstatement of an unlawfully discharged supervisor. The Board held the respondent had satisfied its burden of establishing that upper management had a policy of not tolerating sexual misconduct of its supervisors, and in fact had discharged a supervisor in the past for admittedly engaging in such behavior.

I find that Respondent has not met its burden, under the above authorities, of establishing it would have discharged Ditmars when it reviewed its August 26 phone statement. The record shows that, prior to gaining knowledge of any union activity, Respondent had counseled Kolenda on December 13, 2001, about excessive cell phone use. Kolenda had started working for Respondent on September 10, 2001. He testified that in December 2001, he had a discussion with P. Bailey about excessive cell phone use, and Respondent's assertion is uncontradicted that this took place on December 13, 2001. Respondent's records reveal that for its cell phone bills with a statement date of November 18, 2001, Kolenda made 34 calls, which created no additional cost for Respondent. (See, Appendix A for a summary of cell phone use among Respondent's apprentices for the period of November 18, 2001, to September 21, 2002.)[23] While Kolenda's cell phone use dropped to 11 calls for the period in Respondent's January 2002, statement, he returned to 62 and 68 calls for the subsequent February and March billing dates, but received no warning at that time. Beginning in April 2002, Respondent had to pay small amounts of extra money on a monthly basis for Kolenda's cell phone usage. Yet, he did not receive a written warning about it until September 9, 2002, after Respondent was alerted to his union activity. The written warning to Kolenda states "Further misuse of the phone privilege could result in disciplinary action or termination." Thus, the written warning for this offense Respondent did not threaten Kolenda with automatic discharge.

During the period of April 21, to August 26, 2002, apprentice Wilcox averaged 46 calls a month to Kolenda's 43. For the statement date of April 21, 2002, Wilcox made 85 calls, at an extra cost of $21.92 to Respondent. Yet, there is no contention that Wilcox, for whom there was no evidence of union activity, ever received a warning for excessive cell phone usage. Wilcox cost of the phone usage for the month of April was almost three times higher than any monthly statement attributed to Ditmars.

Concerning Ditmars' phone usage, he made 79 calls, as reflected in Respondent's May 25, statement. Ditmars calls increased to 144 in Respondent's June 21, statement. On July 17, L. Bailey verbally counseled him about excessive cell phone usage. Respondent's statement for calls covering the period of June 17 through July 18, did not issue until July 21. However, the statement for this period reveals Ditmars usage had increased to 221 calls. The vast majority of these calls were made before Ditmars received the July 17 verbal counseling. Ditmars was discharged on August 16. However, the August 26, phone bill reveals that despite L. Bailey's verbal counseling, Ditmars did not significantly cut back on his cell phone use in that he made or received 152 calls during this billing period. Nevertheless, the evidence reveals Respondent had no fixed policy on the amount of calls an employee could make, and that any limitations on the amount of personal calls it tolerated from employees was not strictly enforced. In this regard, Respondent had never even issued a written warning to any employee about cell phone usage until after it learned employees were engaging in union activity. Taking into consideration Respondent's inconsistent application of its phone policy, I cannot find Respondent has established it would have discharged "any employee" who engaged in the conduct Ditmars engaged in concerning his cell phone usage.[24] I therefore find Respondent has not established a sufficient basis to bar Ditmars from reinstatement. See *Tel Data Corp.*, supra and *Marshall Durbin Poultry Co.*, supra.[25]

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) and (3) of the Act by:

a. On August 15, 2002, issuing a written warning dated August 14, 2002, to its employee Thomas Ditmars because he engaged in union activities.

b. On August 15, 2002, placing a disciplinary memo in employee Thomas Ditmars' file because he engaged in union activities.

c. On August 16, 2002, discharging employee Thomas Ditmars because he engaged in union activities.

[23] Respondent did not submit any bills into evidence, prior to the November 18, 2001, statement.

[24] In reaching this conclusion, I do not find that Respondent cannot discharge Ditmars, or any other employee, for misuse of Respondent's cell phone. I only find that Respondent has not established it would have discharged Ditmars at the time it received his August 26 phone bill, absent his union activity.

[25] As set forth above, Respondent tolerated repeated violations of its attendance policy by its employees before it discharged anyone. Moreover, a former apprentice named Ford worked for Respondent from May 2000, until he was discharged in November 2001. Ford's discharge memo states he worked for Respondent for 2 years with multiple customer complaints and no advancement in his performance. It is stated in the memo, "we have given you multiple opportunities to better yourself and still no advancement has been shown." Thus, in the past Respondent has shown a wide range of latitude prior to discharging an employee.

2. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employee Thomas Ditmars must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from August 16, 2002, the date of Ditmars' discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, George P. Bailey & Sons, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing warnings, and file memos to employees because they engage in union activities.

(b) Discharging employees because they engage in union activities.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employee Thomas Ditmars full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Thomas Ditmars whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written warning, file memo, and discharge of Thomas Ditmars and within 3 days thereafter notify Ditmars in writing that this has been done and that the written warning, file memo, and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by Region 4, post at its facility in Bristol, Pennsylvania, copies of the attached notice marked "Appendix B"[27] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent on or after August 15, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 2, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue written warnings or file memos to employees because they engage in activities on behalf of the International Brotherhood of Electrical Workers, Local Union No. 269, AFL–CIO, or any other labor organization.

WE WILL NOT discharge employees because they engage in union activities.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United Stated Court of Appeals Enforcing and Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days of the Board's Order, offer Thomas Ditmars full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Thomas Ditmars whole for any loss of earnings and other benefits he may have suffered as a result of the unlawful discrimination against him in the manner instructed by the National Labor Relations Board.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful written warning, file memo, and discharge of Thomas Ditmars and within three days thereafter notify the him in writing that this has been done and that the written warning, file memo, and discharge will not be used against him in any manner.

GEORGE P. BAILEY & SONS, INC.